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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JAMES LEE SUTHERLAND, Defendant and Appellant.	2d Crim. No. B215188 (Super. Ct. No. 1224198) (Santa Barbara County)

James Sutherland appeals from his conviction by jury of 15 counts of committing lewd acts on a child by means of force or duress (Pen. Code, § 288, subd. (b)(1)), two counts of sodomy by means of force or duress (§ 286, subd. (c)(2)), one count of aggravated sexual assault of a child based on sodomy by force or duress (§ 269, subd. (a)(3)), one count of aggravated sexual assault of a child based on oral copulation by force or duress (§ 269, subd. (a)(4)), and one count of oral copulation by means of force or duress (§ 288a, subd. (c)(2)).[1] As to each count, the jury found true allegations that appellant committed specified sex offenses against more than one victim (§ 667.61, subd. (b), "the one strike statute"), that he had substantial sexual conduct with the victims (§ 1203.066, subd. (a)(8)), and that he committed the crimes within the applicable statute of limitations

[1] All statutory references are to the Penal Code unless stated otherwise.

(§§ 799, 801.1, subd. (b), 803, subd. (f)). The trial court sentenced appellant to 20 consecutive terms of 15 years to life in prison pursuant to the one strike statute.

Appellant contends that (1) there was insufficient evidence of force or duress to sustain any of his convictions, (2) that his sentence violated the ex post facto clause because the prosecution did not establish that all of his conduct occurred after enactment of the one strike statute, and (3) that the trial court violated his sixth amendment right to counsel because it did not appoint advisory counsel or conduct a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 when appellant claimed his retained counsel was ineffective. We agree that sentencing under section 667.61 on counts 1, 19 and 20 was prohibited by ex post facto principles. We vacate the finding on the one strike allegations as to counts 1, 19 and 20 and remand for resentencing on those counts under the formerly applicable sentencing provisions. We otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In April of 1994, the Doe family moved in next door to appellant. John Doe was six years old.[2] His brother Jim was four years old.[3] Appellant was in his late twenties and worked at home as a computer specialist.

Appellant became a friend of the family. The family did not initially have a computer. Soon after they moved in, John started going to appellant's house to do homework, to use the internet and to play videogames. His little brother Jim would also go to appellant's house to play video games and to see appellant's Star Trek toy collection. Appellant began taking John, Jim and their friends to movies, dinner, hiking and swimming. He gave them toys, video games and food. He photographed them and encouraged them to skinny dip.

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[2] John Doe was born in September 1987.

[3] Jim Doe was born in October 1989.

Abuse of John Doe

John testified that he was six or seven years old when appellant first molested him.[4] Appellant told John that if he undressed he would give him a gift. Appellant locked the bedroom door, lay naked on top of John and masturbated against John's body. (Count 1, § 288, subd. (b)(1).) Afterward, appellant told John not to tell anyone or they would both get in trouble. He said John would be in trouble with the police and his parents if they found out. Appellant said they should ask God to forgive them both.

John testified that he was afraid of appellant because appellant was much older, a lot bigger and a lot stronger. John did not tell anyone because he was afraid of getting in trouble. He trusted appellant and saw him as a mentor.

When John was about eight to ten years old, appellant took him into the shower and locked the bathroom door. He molested John in the shower and then lay on top of him on the floor, masturbating against him. (Count 3, § 288, subd. (b)(1).) On three subsequent occasions while John was still eight to ten, appellant took John into the shower and orally copulated him. (Counts 4, 5 & 6, § 288, subd. (b)(1).)

John testified that he was intimidated by appellant. Each time appellant molested John, he told John afterward that they would both get in trouble if John told, that it would not happen again, and that they should pray for forgiveness. Appellant would cry while they prayed. Appellant told John that they were equally at fault and that if John told anyone, his parents would be upset and people would think that he was gay. Appellant always locked the bedroom or bathroom door, and he always closed the bedroom blinds and curtain before molesting John. Appellant bribed John to engage in sexual conduct using cash, CD's, movies and food outings.

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[4] The one strike statute was enacted when John was seven years and three months old.

While John was still between eight and ten, appellant attempted twice to sodomize him. (Counts 7 & 8, § 288, subd. (b)(1).) The first time, appellant "us[ed] his muscles" to forcibly roll John onto his belly and used an angry tone of voice when John resisted. When appellant started to sodomize him the second time, John got dressed. When John was ten, appellant did sodomize him after promising that, if John cooperated, it would be the last time anything happened. (Count 9, § 269, subd. (a)(3).

When John was about nine, appellant bribed John to sodomize appellant on at least two occasions. (Counts 10 & 11, § 286, subd. (c)(2).) John could not recall what he was bribed with.

When John was about 10, appellant orally copulated him under a bridge a few blocks from home. (Count 14, § 288, subd. (b)(1).) On other occasions, he orally copulated John in the bedroom. (Count 2, § 288, subd. (b)(1); Count 13, § 288a, subd. (c)(2).)

When John was still about 10, appellant forced John to orally copulate him by pushing down on John's shoulders, with "pretty much all he ha[d]." (Count 12, § 269, subd. (a)(4).) On a later occasion, appellant asked John to orally copulate him, but John refused and appellant told John to masturbate appellant, which John did. (Count 18, § 288, subd. (b)(1).)

John also testified that when he was about 11 or 12, appellant exposed himself and touched John's thigh while they were in appellant's car. (Count 16, § 288, subd. (b)(1).)

John testified that they usually had to be quiet in appellant's house because people lived upstairs from appellant, but one night no one else was home and appellant chased John through the house naked and then forced his tongue into John's mouth and touched John's genitals. (Count 15, § 288, subd. (b)(1).) Another time, appellant was masturbating on top of John when they heard the garage door open. Appellant told John to get dressed and be quiet. Appellant unlocked the bedroom door and opened it a little. (Count 17, § 288, subd. (b)(1).)

John testified that all of the abuse occurred when he was between 7 and 13 years old. When John was 10 years old his parents divorced and his father left the house. Appellant became a quasi-parent figure to John. When John was 14 his father died.

Abuse of Jim Doe

Jim was between four and six years old when appellant started molesting him in appellant's bedroom. Jim testified that appellant would lay in his boxers on top of Jim and masturbate against Jim's body. Afterward, appellant would say, "I am sorry, please don't say anything, keep it between us." He would bribe Jim with video games, food, toys or action figures.

John testified that he was present twice when appellant molested Jim. Jim was about five years old.[5] Both times, appellant pulled down Jim's pants, lay on top of Jim, and masturbated against Jim's body. (Counts 19 & 20, § 288, subd. (b)(1).) Afterward, appellant told the boys not to tell and that he would take them to get video games.

Jim considered appellant a close friend and knew his parents trusted appellant. Both boys testified that their parents asked them whether appellant ever tried to touch them and they both said he had not. The boys never discussed the abuse with each other. A school principal asked John if appellant had touched him. John said he had not.

Abuse of Other Children

Five other witnesses testified that appellant engaged in inappropriate or sexual conduct with them when they were children.

Disclosure and Prosecution

When John was 18, he told his sister about the abuse, and the family reported it. John made a recorded call to appellant, in which appellant apologized

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[5] The one strike statute was enacted six weeks after Jim turned five years old.

for abusing John. Appellant did not deny the specific conduct that John described to him. At trial, the jury heard the recording.

Appellant testified that he did not molest anyone. He said he thought the recorded call was a sick practical joke and he just played along. Appellant presented several character witnesses, including one boy who testified that he had a close relationship with appellant and was not molested.

The jury returned its verdict in November 2008. The court set the matter for sentencing for the end of January 2009. In January, the court granted appellant's motion to continue sentencing to March, over the prosecution's objection, so appellant could retain new counsel to prepare a motion for new trial. The court stated that appellant should be ready to proceed on March 19 and that new counsel would not be allowed to substitute into the case unless they were ready to proceed.

Appellant did not replace his counsel. On March 9, counsel filed on his behalf a motion for new trial based on prosecutorial misconduct. On March 18, appellant filed on his own behalf a petition for writ of habeas corpus based on ineffective assistance at trial. At the March 19 hearing, the court said it would consider the habeas petition as a supplement to the motion for new trial. The court also asked appellant whether he wished to proceed with his present counsel or whether he had retained substitute counsel. Appellant responded, "I don't have another one, he will be fine for today." The court heard and denied the motion for new trial.

DISCUSSION

Sufficiency of Evidence of Force or Duress

Appellant contends there was insufficient evidence of force or duress to sustain his conviction on counts 1-20. We do not agree.

Each of the 20 charged counts required proof that the crime was committed against the will of the victim by means of force, menace, duress, violence or fear of immediate and unlawful bodily injury to the victim or another.

(Counts 1-8, 14-20, § 288, subd. (b)(1); count 9, § 269, subd (a)(3); counts 10-11, § 286, subd. (c)(2); counts 12-13, § 288a, subd. (c)(2).)

Duress is "a direct or implied threat of force, violence, danger, *hardship* or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted." (*People v. Leal* (2004) 33 Cal.4th 999, 1004, quoting with approval *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50.) Duress is a question of fact to be determined from all of the surrounding circumstances, including the age of the victim, his or her relationship to the defendant, and the child's relative physical vulnerability. (*People v. Superior Court (Kneip)* (1990) 219 Cal.App.3d 235, 238.) Other relevant factors include physical control of the victim (see *Pitmon*, at p. 51) and warnings that disclosure of the molestation will result in negative consequences. (See *Leal*, at p. 1002.) Duress requires, at a minimum, evidence of an implied threat of force, violence, danger, hardship or retribution (*People v. Hecker* (1990) 219 Cal.App.3d 1238, 1250), but "[t]he fact that the victim testifi[ed] the defendant did not use force or threats does not require a finding of no duress; the victim's testimony must be considered in light of [his] age and [his] relationship to the defendant." (*People v. Cochran* (2002) 103 Cal.App.4th 8, 14.) Evidence of an express or implied threat of hardship is sufficient. (*Leal* at p. 1010, disapproving a holding to the contrary in *People v. Valentine* (2001) 93 Cal.App.4th 1241.)

It is for the jury to determine whether, based on all the surrounding circumstances, a reasonable child in the victim's position would have been coerced. (*People v. Leal, supra,* 33 Cal.4th at p. 1010.) Our role is limited. We review the entire record in the light most favorable to the judgment to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We presume in support of the judgment every inference the jury could reasonably draw from the

evidence and we do not second-guess its determinations of credibility or reweigh the evidence. (*Ibid.*)

Age and size disparity may support a finding of duress. In *People v. Veale* (2008) 160 Cal.App.4th 40, there was sufficient evidence of duress to support defendant's conviction of forcibly molesting his six- or seven-year-old stepdaughter (§ 288, subd. (b)) based on age and size disparity, the defendant's position of authority in the family, the fact that the abuse occurred in a locked room on at least one occasion, and the victim's unsubstantiated fear that he would harm her or her family if she disclosed the abuse. (*Id.* at p. 47.) The victim in *Veale* testified that her stepfather had never made any threats, that he never used force, and that on the two occasions when she resisted him he relented. (*Id.* at p. 46.) She could not say why she feared him. (*Id.* at p. 45.) Here, appellant was significantly older and larger than both boys when the abuse began, he abused them behind locked doors, and John testified that he was afraid of getting into trouble with his parents and police if he disclosed the abuse.

Appellant was not a parent, but he was a trusted family friend who was a mentor and a quasi-parent. Children are not coerced only by parents. In *People v. Pitmon, supra,* 170 Cal.App.3d at p. 48, there was sufficient evidence of duress to sustain convictions for violating section 288, subdivision (b) where the defendant, a stranger to the victim, made no explicit threats but his victim was eight years old and he molested the child on an isolated bench and in isolated shrubbery. The defendant had, in one of the other charged acts, controlled the victim's hand, but had not otherwise used physical force. Here, the Doe brothers were only four to seven years old when the abuse began and each act occurred in an isolated location. John testified that he was intimidated by appellant and that he was afraid of him because appellant was much older, a lot bigger and a lot stronger. The jury could reasonably infer that his younger and smaller brother was similarly intimidated.

Evidence of use of force is not a prerequisite to establishing duress, but any use of physical control is a factor to be considered. A finding of force,

unlike duress, must be supported by proof that the defendant used physical force substantially greater than that necessary to accomplish the lewd act itself. (*People v. Quinones* (1988) 202 Cal.App.3d 1154, 1158.) If a defendant grabs or holds a victim who is resisting there is generally sufficient evidence of force above that needed to accomplish the act. (*People v. Cochran, supra,* 103 Cal.App.4th 8, 13.) Appellant used physical force against John when he "used his muscles" to roll John over before his first attempt to sodomize him (count 7) and when he pushed down on John's shoulders with "all he had" to make John orally copulate him (count 12). Appellant used physical control over both boys when he lay on top of them and masturbated against their bodies (counts 1, 3 & 17 [John] & counts 19 & 20 [Jim]). A jury could conclude that this use of physical control and force perpetuated appellant's coercive influence over John and Jim and supported a finding of duress.

Even without prior use of force, a threat of hardship, retribution or punishment may support a finding of duress. (*People v. Bergschneider* (1989) 211 Cal.App.3d 144, 154, disapproved on other grounds in *People v. Griffin* (2004) 33 Cal.4th 1015.) In *Bergschneider,* sufficient evidence of duress sustained a conviction for forcible oral copulation (§ 288a, subd. (c)) where the 14-year-old victim's stepfather threatened to restrict her privileges if she would not submit. (*Bergschneider,* at p. 154.) The victim functioned intellectually as a nine-year-old. (*Id.* at p. 150, fn. 1.)

In *People v. Superior Court* (*Kneip*), *supra,* 219 Cal.App.3d at p. 238, a relationship of trust and threats of humiliation provided sufficient evidence of duress to withstand a motion to dismiss forcible lewd act charges. (§ 288, subd. (b).) The defendant was a neighbor and trusted friend of the victim's mother. He threatened to tell a babysitter that the victim had touched the defendant's genitals if the victim did not submit. The child was five to eight years old and the acts occurred in an isolated bedroom away from other adults. (*Kneip,* at pp. 238-239.) Here, appellant was also a neighbor and family friend, and he threatened John with humiliation when he suggested that the police and parents would think he was gay.

The threatened hardship may be punishment of a beloved perpetrator, rather than punishment of the victim. In *People v. Cochran, supra,* 103 Cal.App.4th 8, there was sufficient evidence to sustain conviction for ten counts of forcible lewd acts by means of duress (§ 288, subd. (b)) where the nine year old victim testified that she was not afraid of her father, but that he would give her money and things for school or candy when she submitted to sex with him and he told her that he would get in trouble and go to jail if she told anyone. (*Id.* at p. 12.) Here, a jury could infer that the boys concealed the abuse and submitted to it in order to protect appellant from punishment and because they understood that disclosure would end the relationship. Appellant was not the victims' father, but he was their mentor and a male role model upon whom they relied for privileges and gifts. They had been told by their parents that it was wrong for an adult to touch a child as appellant did. Both boys testified that they followed appellant's instruction not to tell anyone. "A simple warning to a child not to report a molestation reasonably implies the child should not otherwise protest or resist the sexual imposition." (*People v. Senior* (2002) 3 Cal.App.4th 765, 775.)

Appellant's reliance on *People v. Espinoza* (2002) 95 Cal.App.4th 1287 is misplaced. In *Espinoza*, there was insufficient evidence to support a finding of duress where the 12-year-old victim reported her father's abuse within two weeks of its inception. The defendant made no threats, express or implied, during their silent encounters in her bedroom. The only thing her father ever said to her about the abuse was, "Do you still love me?" and, "Please love me." (*Id.* at p. 1295.) Here, the boys were significantly younger than 12 years old when the abuse started, and evidence supported an inference that appellant successfully coerced their submission and silence for many years by means of express and implied threats of hardship and retribution.

We conclude that sufficient evidence in the record supports a finding that appellant accomplished all of the charged acts by means of duress.

One Strike Sentencing

Appellant contends that application of the one strike sentencing statute violated the ex post facto prohibitions in the California and United States Constitutions because there was no proof beyond a reasonable doubt that any of the crimes were committed after the effective date of the one strike statute. (Cal. Const., art. I, § 9; U.S. Const., art. 1, § 10; *People v. Riskin* (2006) 143 Cal.App.4th 234.) We agree as to counts 1, 19 and 20 only.

Where the evidence at trial does not establish that the charged molestation occurred on or after the effective date of the statute providing for the defendant's punishment, the defendant is entitled to be sentenced under the formerly applicable sentencing provisions. (*People v. Hiscox* (2006) 136 Cal.App.4th 253, 256.) A claim that an ex post facto violation resulted in an unauthorized sentence is not forfeited by failure to object in the trial court. (*Id.* at p. 259.)

The one strike statute became effective on November 30, 1994. (§ 667.61, *People v. Alvarez* (2002) 100 Cal.App.4th 1170, 1178.) On November 30, 1994, John was seven years old and Jim had just turned five. For purposes of our ex post facto review, "the verdicts cannot be deemed sufficient to establish the date of the offenses unless the evidence leaves no reasonable doubt that the underlying charges pertained to events occurring on or after November 30, 1994." (*People v. Hiscox, supra,* 136 Cal.App.4th at p. 261.)

In *Hiscox,* the one strike sentence was reversed because the trial record left reasonable doubt whether undistinguished acts of molestation spanning four years occurred before or after the statute's enactment. Remand for resentencing was necessary. The prosecutor had not asked the victims to identify when they were molested with any specificity. (*People v. Hiscox, supra,* 136 Cal.App.4th at p. 258.) Here, distinct acts were alleged and the victims identified when those acts occurred with reasonably specific reference to their ages.

John's testimony established that all but count 1 against him occurred when he was 8 or more years old, after the statute's effective date. John testified

that count 1 occurred when he was "[s]ix to seven years old." He testified that counts 3, 4, 5, and 6 occurred when he was "maybe about eight to ten years old," counts 7 and 8 occurred when he was "[a]bout eight to ten years old," counts 10 and 11 when he was "[a]bout nine years old approximately," count 9 when he was "[a]bout ten years old," counts 2, 13 and 14 when he was "[m]aybe about ten years old," counts 12 and 18 when he was "[m]aybe about ten years old," and "after," and count 16 when he was "probably 11, 12 years old." He did not specify his age at the time of counts 15 and 17, but it was clear in the context of his testimony that these acts occurred after count 3, when he was eight or more years old. Appellant contends that John's testimony was speculative, because he said "maybe," "about," "probably" and "approximately." The objection is waived because it was not raised in the trial court.

Jim's testimony did not establish that he was abused after the statute's effective date. Jim testified that he was "four to six years old" when appellant first abused him. (Count 19.) He did not specify when count 20 occurred, but John testified that Jim was "maybe about five years old" when both acts occurred and did not testify to the amount of time that passed between the two acts. This leaves open the possibility that one or both acts occurred in the six weeks after Jim turned five, before the statue's effective date.

Because the evidence leaves reasonable doubt whether counts 1, 19 and 20 occurred after November 30, 1994, this matter must be remanded for resentencing without applying the one strike statute as to those three counts. (*People v. Alvarez, supra,* 100 Cal.App.4th at p. 1178.)

Post-Trial Claim of Ineffective Assistance of Retained Counsel

Appellant contends that the trial court erred when it denied his claim of ineffective assistance of counsel without appointing advisory counsel to investigate or conduct a *Marsden* hearing on the merits. (*People v. Marsden, supra,* 2 Cal.3d 118.) We disagree. Because appellant had retained counsel and did not

request substitute counsel, the trial court was required only to rule on the motion for new trial, which it did. (*People v. Gay* (1990) 221 Cal.App.3d 1065, 1071.)

When a defendant with appointed counsel seeks new counsel on the grounds of inadequate representation, the court must allow the defendant to explain the basis for his contentions and describe specific instances of ineffective representation. (*People v. Marsden, supra,* 2 Cal.3d 118.) Such a motion may be made post-trial for purpose of sentencing or moving for a new trial. (*People v. Winbush* (1988) 205 Cal.App.3d 987.) These principles are inapplicable here, because appellant did not have appointed counsel and he did not request new counsel. "[A] defendant may not raise the issue of substitute counsel on appeal, when it was not raised in the trial court." (*People v. Gay, supra,* 221 Cal.App.3d at p. 1070.) Even when a defendant has appointed counsel, the procedures under *Marsden* to determine the factual basis of the defendant's claim are not required unless the defendant requests substitute counsel. (*Ibid*.) In *Gay*, no *sua sponte* inquiry was required where defendant moved for new trial based on ineffective assistance of appointed counsel, because he did not request substitute counsel. "A trial judge should not be obligated to take steps toward appointing new counsel where defendant does not even seek such relief." (*Ibid.*)

In supplemental briefing, appellant cited *People v. Reed* (2010) 183 Cal.App.4th 1137, for the principle that no request for substitute counsel was necessary to trigger a *Marsden* inquiry. Appellant interprets *Reed* too broadly. In *Reed,* the defendant was indigent and he had appointed counsel. The Court of Appeal concluded that he implicitly requested substitute counsel when he asked to pursue a motion for new trial based on ineffective assistance of counsel because he had already brought two unsuccessful *Marsden* motions, and his appointed counsel refused to prepare the motion for new trial. (*Id*. at p. 1145.) The trial court had no information about the factual basis for his ineffective assistance claim, but refused to inquire into it and told him to instead discuss it with appellate counsel. The Court of Appeal reversed the judgment and directed the trial court to inquire into

the defendant's claim of ineffective assistance of counsel, and, if it found good cause, to appoint new counsel to investigate and present his motion for new trial. (*Id*. at pp. 1149-1150.)

Here, *Reed* does not control because appellant was not indigent, his counsel was retained, and no request for substitute counsel can be implied. Appellant was granted a continuance to obtain substitute counsel but he returned to court with the same attorney and told the court, "I don't have another one. He will be fine for today." The trial court had before it the details of appellant's claim, which were set forth in his declaration, and it considered his claim on the merits. In the circumstances, the court was required only to rule on the motion for new trial, which it did.

DISPOSITION

The 15-year-to-life sentence on counts 1, 19 and 20, and the findings on the one strike allegations as to counts 1, 19 and 20 (§ 667.61, subd. (b)), are vacated. This matter is remanded for resentencing on counts 1, 19 and 20 under the law in effect prior to November 30, 1994. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Edward H. Bullard, Judge

Superior Court County of Santa Barbara

Richard E. Holly, under appointment by the Court of Appeal, for Defendant and Appellant.

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